



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2021] NZDT 1306

APPLICANT TC and AK

RESPONDENT BH and TH as trustees

RESPONDENT LD as trustee

The Tribunal orders:

BH, TH and LD as trustees of the ABC Trust are to pay TC and AK \$17,336.99 on or before Thursday 15 April 2021.

Reasons:

1. TC and AK entered a share milking contract with the trustees of the ABC Trust (**Trustees**). The relationship deteriorated and the Trustees terminated the contract. Upon termination, the final milk contract payment was made to the Trustees in place of TC and AK. TC and AK seek reimbursement for the final milk contract payment. The Trustees maintain that they are entitled to make deductions from the final payment for costs they incurred in relation to the contract.
2. TC and AK claim \$16,456.38 plus GST and interest in relation to the final milk payment, and their filing fee.
3. The issues to be determined are:
 - a) Did the Trustees breach the contract when they did not pay the final Contractor Payment to TC and AK?
 - b) Are the Trustees entitled to deduct the costs they claim from the final Contractor Payment?
 - c) Are TC and AK entitled to the sum claimed?

Did the Trustees breach the contract when they did not pay the final Contractor Payment to TC and AK?

4. The general law of contract applies. A legally binding contract is formed when both parties intend to contract on agreed terms and intend for those terms to be legally binding. The terms of a contract are formed at the beginning, not at the end. What was agreed is looked at objectively, i.e. by looking at what was said and done. The law of contract requires parties to a contract to adhere to the terms of that contract unless there is a legal reason not to do so.

5. The parties entered a standard Federated Farmers “New Zealand Contract Milking Agreement” on 22 April 2020. The relevant terms of the contract are as follows:
- a) Contractor Rate: \$1.10/kgMS (plus GST) (Item 5, Part 2).
 - b) “Contractor Payment” means the fee payable to the Contractor by the Owner (either by the Owner directly or the Dairy Company on instruction from the Owner), which is calculated by multiplying the Contractor Rate by the amount of Milksolids produced (in kgMS) by the Herd under this Agreement (clause 1.1, Part 3).
 - c) The Owner will pay the Contractor the Contractor Payment calculated using the Contractor Rate set out in Item 5 (cl. 10.1, Pt 3).
 - d) Following termination, each party will be entitled to all payments and deferred payments actually due to that party as at the date of termination, including the Contractor Payment in relation to any unpaid milk payment due to the Contractor without deduction or withholding in accordance with clause 21.27, but subject to any adjustments in respect of any other matters of income or outgoings or both arising under the terms of this Agreement (cl. 22.14, Pt 3).
 - e) Clause 22.14 does not limit the right of the Owner or the Contractor to claim damages for the non-performance by the other party of any obligation expressed or implied in this Agreement and is also without prejudice to any other rights of either party under this Agreement (cl. 22.15, Pt 3).
 - f) The Owner will pay the Contractor its Contractual Payment in full, without deducting or withholding any amount. The Owner has no right of set off in relation to the Contractor Payment under this Agreement (cl. 21.27, Pt 3).
 - g) It will be a material breach of this Agreement if the Owner breaches clause 21.27 and withholds money from the Contractor (cl. 21.28, Pt 3).
 - h) If the Owner withholds money from the Contractor in breach of clause 21.27, then the Contractor will be entitled to the immediate payment of the amount withheld plus penalty interest in accordance with clause 21.32, without prejudice to any other rights or remedies available to the Contractor under this Agreement (cl. 21.29, Pt 3).
 - i) In the event of any money (including payment of the Contractor Payment) being due to the Contractor by the Owner under this Agreement and that is not subject to any genuine and communicated dispute, the Contractor will present an itemised and costed account to the Owner. The Owner must pay this account within one calendar month of receipt. If the [Owner] fails to pay this account within one calendar month of receipt, the Contractor will be liable for penalty interest of 8% per month (with interest to be compounded monthly) on the unpaid amount owing to the [Contractor] until such time as payment is made (cl. 21.31, Pt 3).
6. There is no dispute between the parties regarding the exercise of the right to terminate under the agreement by the Trustees, and so that issue was not considered.
7. The date of termination and final day of milking for TC and AK was 18 September 2020.
8. TC and AK provided evidence to show that they produced 13,903 kgMS for the period 1 September to 18 September 2020 (**relevant period**).
9. The Trustees accept that they advised Fonterra that the contract was at an end and then received the Contractor Payment for the relevant period and did not pass on the payment to TC and AK.

10. The contract stipulates that on termination TC and AK are to receive the Contractor Payment in relation to any unpaid milk payment without deduction or withholding any amount and that the Trustees have no right of set off in relation to the payment (cl. 21.27 and 22.14, Pt 3).
11. On the facts and the terms of the agreement it is clear that TC and AK were entitled to the Contractor Payment for the relevant period and that the Trustees have withheld the payment.
12. I am satisfied therefore that the Trustees breached the contract when they did not pay the final Contractor Payment to TC and AK.

Are the Trustees entitled to deduct the costs they claim from the final Contractor Payment?

13. The Trustees contend that they are entitled to setoff costs they have incurred in relation to the contract from the final Contractor Payment. They point to the wording in clause 22.14 that says the entitlement to payment is “subject to any adjustments in respect of any other matters of income or outgoings or both arising under the terms of this Agreement”.
14. In order to rely on this clause to deduct any sum from the payment, the Trustees need to show that the costs they claim relate to either income or outgoings under the agreement.
15. Neither “income” or “outgoings” is defined in the agreement. Therefore, the words should be given their plain and ordinary meaning.
16. “Income” may be defined as revenue for one’s work, business, lands, or investments. “Outgoings” refer to operational expenses that are incurred. In a tenancy situation, this may include payment for rates or insurance and other charges in addition to the rent. In a share milking contract, this may refer to costs such as electricity charges.
17. The Trustees pointed to the following costs, which they say should be deducted from the payment owed:
 - a) Damage to accommodation/tenanted property;
 - b) Damage to the clutch on a motorbike;
 - c) Damage to a pump in the cowshed;
 - d) Damage to an irrigator;
 - e) Vet bills; and
 - f) An invoice rendered from the Trustees to TC and AK purporting payment due for hours of labour rendered.
18. None of these costs are income/revenue or operational expenses that there is an agreement to pay. They are not related to income or outgoings and so are not deductible under the terms of the agreement.
19. In the High Court, Associate Judge Lester has noted:

“the words “but subject to any adjustments in respect of any other matters of income or outgoings or both arising under the terms of this Agreement” in my view, show that the available adjustments are only in respect of “other matters of income or outgoings”. If anything, the clause emphasises the significance of the no set-off clause in relation to Milk Payments as even on early termination, unpaid Milk Payments due to the Sharemilker are to be paid “without deduction or withholding” in accordance with the no set-off clause. Again, the words above restrict the adjustments to other matters of income or outgoings, or both, arising under the Agreement” (Colebrook v Okarahia Downs Ltd [2019] NZAR 936 at [43]).

20. In addition, clause 22.15 specifically preserves the right of the parties to claim damages for the non-performance by the other party of any obligation expressed or implied in the agreement. This points to the remedy for the damage claimed by the Trustees properly being dealt with as a separate claim, rather than as a setoff allowing non-payment of the Contractor Payment.
21. In relation to the setoff claimed for damage to accommodation, the tenancy is covered by the Residential Tenancies Act 1986 and so is not within the jurisdiction of the Disputes Tribunal. Any claim by the Trustees in relation to the tenancy would need to be made separately through the Tenancy Tribunal. In any event, the claim does not relate to an income or outgoing under the tenancy, so would not be relevant even if it had been within jurisdiction.
22. In the interests of ascertaining all possible relevant information and to ensure that none of the claims might potentially relate to income or outgoings, considerable time was spent at the hearing detailing each of the potential setoffs claimed (excepting the tenancy issue). It is not necessary to detail each of the issues raised by the Trustees as grounds for deduction in this decision, as it is evident that none are income or outgoings.
23. The only deduction or withholding of payment contemplated must relate to income or outgoings under the agreement and none of the items raised by the Trustees are either income or outgoings.
24. I am therefore satisfied that the Trustees are not entitled to deduct the costs claimed from the final Contractor Payment.

Are TC and AK entitled to the sum claimed?

25. Where the terms of the contract expressly provide a remedy for breach of contract, those contractual terms apply. The terms of this contract specify that on termination TC and AK are entitled to the Contractor Payment without deduction. The parties agree that the payment was due to TC and AK on 20 October 2020.
26. TC and AK produced 13,903 kgMS for the relevant period. That figure is multiplied by the Contractor Rate of \$1.10/kgMS (plus GST) to identify the Contractor Payment due: $13,903 \times 1.10 = \$15,293.30 + 15\% (\$2,293.99) = \$17,587.29$.
27. TC and AK also claim interest under clause 21.31 of the agreement. For interest to apply pursuant to that clause, TC and AK need to show that the Contractor Payment was not "subject to any genuine and communicated dispute".
28. TC and AK state that the only dispute raised by the Trustees prior to these proceedings was the issue of damage to the accommodation. Although I am of the view that the claimed damage to the accommodation was not grounds for a deduction from the final payment, it nevertheless may suffice as a genuine and communicated dispute in relation to clause 21.31. (It is also arguable that the compounding interest rate would be a penalty and therefore unenforceable, though the law in this area has recently evolved.)
29. As it is arguable that the money due to TC and AK was the subject of a genuine and communicated dispute, I am satisfied that the interest provision does not apply in this case.
30. TC and AK also claim their filing fee. Under section 43 of the Disputes Tribunal Act 1988 costs are not awarded against a party to any proceedings before the Tribunal, except in situations that do not apply in this case. Therefore, the filing fee is not awarded.
31. The Trustees referred to a vet bill they incurred as one of the grounds upon which they wished to make deductions to the Contractor Payment. Although I have found that this was not grounds for a deduction to be made, during the hearing TC and AK agreed to pay \$250.30 (2 x payments of \$125.15) towards the vet bill. They say they have no knowledge of any animal harm done by them or their staff, but accept if two cows had a bruise or abscess then they would accept that there was a possibility that it may have been caused by their workers and so they are prepared

to pay such costs. They say that animal welfare is of the utmost concern to them as sharemilking contractors.

32. Therefore, \$17,587.29 is due under the Contractor Payment, with \$250.30 to be deducted, meaning the payment due is \$17,336.99.
33. For these reasons BH, TH and LD as trustees of the ABC Trust are to pay TC and AK \$17,336.99 by the date stated in this order.

Referee: T Baker
Date: 25 March 2021



Information for Parties

Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available at the time.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 20 days of the decision having been made. If you are applying outside of the 20 working day timeframe, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

Grounds for Appeal

There are very limited grounds for appealing a decision of the Tribunal. Specifically, the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings. This means you consider there was a breach of natural justice, as a result of procedural unfairness that affected the result of the proceedings.

PLEASE NOTE: Parties need to be aware they cannot appeal a Referee's finding of fact.

Where a Referee has made a decision on the issues raised as part of the Disputes Tribunal hearing there is no jurisdiction for the District Court to reach a finding different to that of the Referee.

A Notice of Appeal may be obtained from the Ministry of Justice, Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 20 days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, then serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

Enforcement of Tribunal Decisions

If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: <http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt>

For Civil Enforcement enquiries, please phone 0800 233 222.

Help and Further Information

Further information and contact details are available on our website: <http://disputestribunal.govt.nz>.